

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIE PEFFER and JESSE PEFFER,

Plaintiffs,

v.

File No. 1:15-CV-78

MIKE STEPHENS, NATHAN EDWARDS,
and JASON COON,

Defendants.

Hearing re: Defendants' Motions
for Summary Judgment

Before

THE HONORABLE GORDON J. QUIST
United States District Judge
July 28, 2016

Digital audio recording transcribed by:

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

APPEARANCES

J. NICHOLAS BOSTIC
909 N. Washington Ave.
Lansing, MI 48906
Attorney for Plaintiffs

LISA J. VOGLER
57 N. Michigan Ave.
Beulah, MI 49617
Attorney for Defendant
Nathan Edwards

SANDRA J. DENSHAM
333 Bridge St., NW
Suite 530
Grand Rapids, MI 49501
Attorney for Defendant
Jason Coon

JOSEPH T. FROEHLICH
Assistant Attorney General
P.O. Box 30736
Lansing, MI 48909
Attorney for Defendant
Mike Stephens

Grand Rapids, Michigan

July 28, 2016

1:58 p.m.

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P R O C E E D I N G S

THE COURT: Julie and Jesse Peffer against Mike Stephens and others, docket number 1:15-CV-78, time set for oral argument on motions for summary judgment by all the defendants. Can I have the appearance of counsel, please?

MR. BOSTIC: Good afternoon, Your Honor. Nick Bostic on behalf of Mr. and Mrs. Peffer who are seated here at counsel table.

THE COURT: Thank you.

MS. VOGLER: May it please the Court, Lisa Vogler on behalf of Nathan Edwards.

THE COURT: Okay.

MR. FROEHLICH: Good afternoon, Your Honor. Joe Froehlich appearing on behalf of Detective/Sergeant Stephens.

THE COURT: Thank you.

MS. DENSHAM: Good afternoon, Your Honor. Sandra Densham appearing on behalf of Defendant Jason Coon.

THE COURT: Thank you.

Counsel, let me tell you I have laryngitis. You

1 probably have noticed it, and it gets worse -- the more I
2 talk, it gets worse, so I'm not going to participate like I
3 usually do with a lot of questions and all that. But let me
4 tell you I've spent a considerable amount of time on the case
5 and I will tell you what my tentative conclusions are, and I
6 don't have to read my own writing because I now have a
7 computer that prints it as I dictate it.

8 Regarding Count 1, that's the count that -- I'll
9 just use your first names if you don't mind so that it will
10 just make it easier for everybody. Julie alleges that
11 Defendant Jason Coon violated the rights of Julie by searching
12 her purse on June 13, 2012. Mr. Coon concedes that there's a
13 factual dispute as to whether he ever searched the purse. Ms.
14 Peffer, Julie Peffer said that he did. Coon said he didn't
15 and the police report backs Coon's version, but there's still
16 an issue of fact as to whether he searched the purse.

17 My tentative conclusion there is that Coon's
18 reliance upon the fact that Jesse had been arrested does not
19 justify the search of Julie's purse. I'll go into it in a
20 little bit more detail about it. Cases that were cited where
21 the officer made a search during criminal activity do not
22 support Coon's position in that regard. There was no report
23 from third parties, no reasonable suspicion regarding any
24 criminal activity on behalf of Julie. That's where I'm coming
25 from. I've got more detail about it.

1 Regarding Count 2, that's a claim brought by Julie
2 again. She alleges that Jason Coon unlawfully seized her cash
3 in the amount of \$1,757 without a warrant and without probable
4 cause. Mr. Coon argues that the claim regarding the cash is
5 barred by the doctrine of collateral estoppel or what is
6 called claim preclusion.

7 That doesn't stand up in my judgment. That argument
8 at least doesn't stand up under Michigan law which does not
9 give collateral estoppel effect to consent judgments. One
10 case in that regard is American Mutual Liability Insurance
11 Company against Michigan Mutual Liability Company, 64 Mich App
12 315, on the Westlaw printout particularly Page 7. And it's
13 also picked up, by the way, in a federal court, and that is
14 Corey against Corey, 212 Westlaw 5945164, Eastern District of
15 Michigan Bankruptcy Court, on Page 5 of that opinion.

16 The Rooker-Feldman doctrine doesn't help Coon in
17 that regard. That applies only to when the plaintiff
18 complains of injury from the state court judgment. Here Julie
19 is not complaining about injury from the state court
20 judgment. She's complaining about injury arising from the
21 seizure of the cash. I refer the parties to Exxon Mobil
22 Corporation against Saudi Basic Industries Corp., 544 U.S.
23 280, 125 S. Ct. 1517, 2005.

24 Count 3, Jesse alleges -- you're taking good notes
25 here, everybody? Okay. Am I going to fast? I am going to

1 fast?

2 MS. VOGLER: No, you're fine, Your Honor.

3 THE COURT: Okay. Count 3, Jesse alleges that Mr.
4 Coon seized his telephone without a warrant and unlawfully
5 searched the contents of the telephone without a warrant to
6 locate the telephone numbers of the plaintiff, Julie Pepper.
7 Jason Coon alleges he had reasonable expectation of privacy in
8 the telephone and the telephone numbers he called.

9 This claim in my judgment is barred by the doctrine
10 of qualified immunity. Events here occurred in June 2012. As
11 stated by the judge in United States v. Gholston, 993 F. Supp.
12 2d 704, 711, Eastern District of Michigan, the legality of a
13 warrantless search -- searches of cell phones incident to
14 arrest remains a point of discussion and disagreement among
15 the courts and an open question in the Sixth Circuit, but it
16 was decided that such searches would be illegal in Riley v.
17 California by the United States Supreme Court. That's 134 S.
18 Ct. 2473, 2488-92, 2014, which held that the police may not
19 search the cell phone of an arrestee without a warrant. The
20 problem with any reliance on that case, it came after the
21 search, so you didn't have any Sixth Circuit law and you
22 didn't have any Supreme Court decision that would make it
23 clearly illegal, so I would dismiss that count.

24 Regarding Counts 4 and 5, these are counts in which
25 Jesse alleges that the Defendant Mike Stephens swore to facts

1 in an affidavit requesting the search warrant for the entire
2 dwelling at Bierri Road, Reed City. It's alleged that the
3 affidavit failed to establish any connection between the
4 flyers and the plaintiffs' dwelling. The alleged affidavit
5 also states there was no nexus or probable cause -- the
6 alleged argument is that there was no nexus or probable cause
7 to show anything illegal going on in the residence. The
8 search of the residence was therefore unreasonable and a
9 violation of the Fourth Amendment of the Constitution. This
10 is a search that occurred I think in July of 2014. But the
11 rationale also applies to Count 5 because both go to the
12 validity of the warrant.

13 Without going into all the detail, I would dismiss
14 those counts because the argument really goes to the issue
15 that the conclusion was wrong by apparently the magistrate or
16 the district judge, whoever, and the officer, but there's no
17 allegation that I saw that there were any lies in the
18 affidavit or anything that was unreasonable, and then he would
19 have a reasonable basis to rely on an affidavit -- I mean, on
20 the warrant issued by the appropriate court officer, which
21 happened here. So that goes to Counts 4 and 5. Count 5
22 alleges that Mr. Stephens seized personal property belonging
23 to the plaintiffs without probable cause and without exception
24 to the Fourth Amendment.

25 Counts 6 and 7 allege common law conversion from

1 retention of the cell phone and bond money in 2012. This
2 count alleges total damages, this is Count 6 now, of \$665.
3 The defendant is Mr. Coon. And then in Count 7 Jesse alleges
4 conversion of a cell phone and bond money in 2012. Once again
5 the defendant is Jason Coon.

6 There was a resolution of the criminal case pending
7 against Jesse Pepper, but his bond money and cell phone were
8 not returned. Apparently the items have now been returned.
9 But in any event I would dismiss the case, those claims,
10 because it's undisputed that Mr. Coon left the Sheriff's
11 Office, Sheriff's Central Michigan Enforcement Team, in 2013,
12 and there was no allegation that he personally possessed the
13 money or cell phone at the time of the alleged conversion.

14 In addition, he's entitled to governmental immunity
15 on the conversion claim. First, the acts were undertaken
16 during the course of his employment. Two, he performed the
17 acts in good faith and without malice. And three, the acts
18 were discretionary as distinguished from ministerial, and he
19 fails to show any facts that Coon acted with malice.

20 Regarding Count 8, Jesse alleges that after the
21 search warrant in 2012 many items of property were not
22 returned. The count is against Nathan Edwards. It's
23 undisputed that Edwards did not execute the search warrant,
24 and even if he had, the property by state law is in the
25 custody of the seizing agency. That's Michigan Compiled Laws

1 Section 333.7532(2), and I'll just cite M.C.L. which I think
2 was cited by the plaintiffs, Section 780.655 which governs an
3 officer in the execution of a search warrant regarding the
4 property or things covered by a search warrant, but it's the
5 seizing agency under the prior statute, not the officer in
6 this case, that is responsible for retaining those things.

7 Regarding the count for exemplary damages, I don't
8 see that's a separate count. It doesn't allege a separate
9 claim. It alleges a form of relief. In other words, I think
10 that you're not in your -- Mr. Bostic, I think that's what you
11 put in a prayer for relief as distinguished from a count.

12 Okay. That's where I'm coming from. I can go in a
13 little detail. Once I make the final decision, I will. Is my
14 voice coming back or is it going away? Mr. Bostic and I know
15 each other quite well, so --

16 MR. BOSTIC: You're at about 50 to 60 percent.

17 THE COURT: Sixty, okay. I'm losing it here. But
18 anyway, how do you want to proceed? In other words, right now
19 the defendants are ahead except for Counts 1 and 2. So, Ms.
20 Dersham (sic) why don't you go ahead and tell me why I'm
21 wrong.

22 MS. DENSHAM: Thank you, Your Honor.

23 THE COURT: There's a lot here. That's why I have
24 to read my writing here -- not my writing, my typing.

25 MS. DENSHAM: Well, if I recorded the Court's

1 comments correctly with respect to Count 1, the Court found a
2 factual dispute with respect to whether Defendant Coon
3 actually executed the search or whether it was the other
4 officer there. I would just rely on our reply brief,
5 specifically Page 2, the Supreme Court's ruling in the Scott
6 case, where the Court stressed there that there must be a
7 genuine issue of fact. There can be disputes, but in this
8 case with --

9 THE COURT: Yeah, but in Scott they had a videotape
10 depicting the actual facts and here you don't have that. Here
11 you have on the one hand and on the other hand, and that makes
12 it a jury issue.

13 MS. DENSHAM: For the record, Your Honor, I would --

14 THE COURT: But there's a videotape in Scott.

15 MS. DENSHAM: I'm sorry?

16 THE COURT: I think there was a videotape in Scott
17 that couldn't be denied.

18 MS. DENSHAM: And I'm not -- I don't know that, Your
19 Honor. I just -- in this case we're just -- we're relying on
20 the fact that at the time contemporaneous with how all these
21 events went down, Trooper Frayre submitted his report where he
22 stated that he obtained consent from Julie Pepper in regards
23 of whether there was consent or not. He stated that he
24 searched her purse. And the only person who says that my
25 client, Jason Coon, searched Ms. Pepper's purse was Ms. Pepper

1 who had never met --

2 THE COURT: Yeah, but that's not an argument on a
3 motion for summary judgment. I have to take all the facts in
4 the light most favorable to the party opposing the motion.

5 MS. DENSHAM: All right.

6 THE COURT: Unless they're clearly, you know, crazy,
7 like the world is flat, or the other case I used to get all
8 the time from a particular lady that she was assaulted by Bill
9 Clinton at the hotel across the street. That kind of thing we
10 can ignore. But when you have witnesses that were both at the
11 point -- you can have ten witnesses. It wouldn't make any
12 difference. If she says that, you know, it was your client,
13 that's it.

14 MS. DENSHAM: All right. Your Honor, I'll move on
15 then just to -- presuming in the light most favorable to the
16 plaintiffs that it was Defendant Coon who executed the search,
17 he had a reasonable basis to do so in fact under all of the
18 circumstances of the arrest of Ms. Pepper's husband and just
19 ascertaining whether there was any weapons or any drugs in her
20 purse. And I think even Ms. Pepper conceded that when the
21 search was conducted, she presumed it was for a search of
22 weapons or drugs, and it wasn't until after she opened her
23 purse more to obtain her driver's license and the cash was in
24 plain view that the cash was seized at that time.

25 THE COURT: Well, I think -- yeah, I think now

1 you're getting there, but it's a close question. There's
2 nothing really to tie the wife in to drug dealing, and the
3 only reason that they could have -- the only legal reason that
4 they could have searched the purse at that point in time with
5 no warrant or anything would be to protect themselves in case
6 they had a suspicion or a reasonable basis to believe that she
7 had some kind of weapon that would interfere with it. But
8 anyway, I got your point.

9 MS. DENSHAM: All right. And I think when you say
10 the only reason, I think that that is -- it may be, you know,
11 the only reason, but it certainly is a very important reason
12 and one that is routinely exercised by law enforcement
13 officers in situations such as this, especially when there's a
14 spouse who's on the scene, not just some uninterested
15 passerby.

16 THE COURT: I understand.

17 MS. DENSHAM: And then with respect to the seizure
18 of the cash, if I'm understanding the Court's reasoning, the
19 Court cited a couple of cases, and we would just rely on the
20 arguments --

21 THE COURT: Okay.

22 MS. DENSHAM: -- in our brief in that respect. I
23 have not read the cases that the Court cited, so I don't have
24 anything more to offer at that point other than the arguments
25 in our brief and the fact that that was in plain view and

1 seized at that time. And I don't have anything else unless
2 the Court has questions.

3 THE COURT: Not right now.

4 MS. DENSHAM: All right. Thank you, Your Honor.

5 THE COURT: Thank you very much, ma'am.

6 Mr. Bogren? I don't think I'm wrong on much of
7 this, Mr. Bogren.

8 MS. DENSHAM: I'm sorry?

9 MR. BOSTIC: You called me Bogren, so Mike has been
10 insulted.

11 THE COURT: Mr. Bostic.

12 MR. BOSTIC: Your Honor, in --

13 THE COURT: I miss Mr. Bogren. Tell him I miss him
14 there, Ms. Dersham.

15 MS. DENSHAM: I will let him know that.

16 THE COURT: I see these two guys together once in a
17 while.

18 MR. BOSTIC: Just in rebuttal to her comments
19 concerning the purse --

20 THE COURT: Don't argue it. I'm --

21 MR. BOSTIC: Don't need to, okay.

22 THE COURT: All right.

23 MR. BOSTIC: In terms of the qualified immunity for
24 the search of the phone, I certainly understand the Court's
25 point and the fact that Riley came out in 2014. But I wanted

1 to take the Court back one step further, and I put some of
2 these things in my brief that we obtained during discovery
3 where Mr. Coon acknowledged that the investigation was getting
4 rather sketchy because Mr. Peffer was going places they didn't
5 anticipate. There was almost an hour delay where he went back
6 home after the meeting at the restaurant and they had to call
7 the informant to decide if the deal was even still going to go
8 down, and at his deposition he expressed some reservation as
9 to whether they even had a case.

10 THE COURT: What about what was on the phone?
11 That's really what, you know, the case goes to. In other
12 words, my recollection is they got the number of his home and
13 they called Julie because they got the number and whatever
14 else they looked at on the phone. You're not arguing that --
15 well, yeah, what is -- it's the confiscation of the phone
16 you're talking about, not the numbers?

17 MR. BOSTIC: Not the confiscation.

18 THE COURT: Not the confiscation?

19 MR. BOSTIC: No.

20 THE COURT: That's what I thought you were -- I
21 didn't think you were, but I thought you were changing it here
22 right now.

23 MR. BOSTIC: The search of the contents of the phone
24 is what the claim is about, I think, but my --

25 THE COURT: Yeah, that's what I thought it was

1 about.

2 MR. BOSTIC: Mr. Coon -- and I pointblank asked him,
3 I said, Well, if you have hesitation as to whether you had
4 probable cause to continue and make the arrest, doesn't that
5 same hesitation apply to the search of the phone or the
6 seizure of the money? I don't remember which of the two, but
7 during his deposition he acknowledged some concern as to
8 whether the deal was going to be completed.

9 THE COURT: Yeah, but you have to have a clear case
10 from the United States Supreme Court and Sixth Circuit. I'm
11 talking about qualified immunity.

12 MR. BOSTIC: Right, but I'm talking about lack of
13 probable cause to even seize it or make the arrest and make
14 the stop initially. Now, we're not challenging those, but my
15 point is he acknowledged to some degree some hesitation on his
16 part and lack of confidence in his case.

17 So that's my only point that I would like to make in
18 terms of, you know, the phone. A case involving the phone
19 itself, I agree. We didn't get Riley until 2014, and I agree
20 that there was -- it was back and forth in the Sixth Circuit
21 in 2012. But going back further, that there had to be
22 probable cause in the first instance regardless of the type of
23 container you're searching. That would be my reliance.

24 THE COURT: You're not done yet. You get to talk
25 now and tell me why I'm wrong on all the other counts.

1 MR. BOSTIC: Oh, okay. I'll start with Mr.
2 Stephens, the detective that --

3 THE COURT: Okay. Count 4 and 5?

4 MR. BOSTIC: Count 4 and 5, who executed the search
5 warrant in 2014 in what we're labeling retaliation because
6 they weren't happy with the deal that Mr. Peffer got a few
7 weeks earlier. The --

8 THE COURT: Well, maybe they can take the deal back.

9 MR. BOSTIC: Well, they let the 21 days to appeal
10 expire. The Court's comments focused on an inability to find
11 any particular false statements in the affidavit.

12 THE COURT: Right.

13 MR. BOSTIC: I spent a lot of time on the brief
14 going back through and criticizing and challenging the
15 detective's conclusions as to the importance of things. I
16 don't need to reiterate that. I know you've seen how I
17 approached trying to convince you that he should have known
18 better.

19 He should have known that he was misleading the
20 magistrate with some of those conclusions, particularly the
21 post office issue. I mean, the zip code representation is
22 just wrong, and then the conclusion, his conclusion that there
23 was consistency between the 2013 letters and the 2014
24 flyers --

25 THE COURT: But here's the problem. You're

1 criticizing him and he put -- he didn't lie in any of the
2 affidavits. You agree he didn't lie in his affidavit?

3 MR. BOSTIC: No.

4 THE COURT: You don't agree?

5 MR. BOSTIC: I do not.

6 THE COURT: All right.

7 MR. BOSTIC: Especially with the post office issue.

8 THE COURT: Tell me what -- tell me the facts that
9 are wrong in that. I've got it marked here.

10 MR. BOSTIC: He alleged that the Grand Rapids post
11 office was the central sorting facility for post office
12 numbers beginning in 494, but Big Rapids is 493. Now, I don't
13 think he specifically represented in the affidavit that Big
14 Rapids was 493, and frankly I think he left it out. Well,
15 that's a huge omission. He let that magistrate believe that
16 because of the zip code issue, there was some direct
17 connection between those flyers and Mr. Pepper or at least
18 Mr. Pepper's residence. That's simply not true. Now, Big
19 Rapids mail may in fact be sorted in Grand Rapids, but my
20 point is the representation about the zip code connection was
21 very misleading.

22 THE COURT: I don't get it. I live in Grand Rapids
23 and my zip code is 495 and then, you know, then a lot of
24 numbers. I used to live in Grand Haven and it would be sent
25 from Grand Rapids and I would get a Grand Rapids postal stamp

1 on there. And I have a -- or had a house up in Ludington on
2 the lake and that zip code is almost like Spring Lake's zip
3 code. You just trade the last couple numbers, but they're all
4 49 something.

5 MR. BOSTIC: Right. I mean, we have 48 in one half
6 of the state and 49 on the other half of the state.

7 THE COURT: That's to get something there, but once
8 they get to the post office after you mail it, they just stamp
9 it Grand Rapids. They're all accumulated.

10 MR. BOSTIC: Right, and us non-postal employees, we
11 don't know. There's a lot about how that mail is shipped
12 around the state that we don't know. But he gave the
13 impression that he did know, and he doesn't and he was wrong.

14 THE COURT: Okay.

15 MR. BOSTIC: Another false statement is his
16 statement that the 2013 letters and the 2014 flyers all
17 appeared to have some similar characteristic or
18 characteristics or be generated by the same mechanism or the
19 same person, and I went into a lot of detail, Your Honor, in
20 the brief and I don't need to repeat it here. But that's
21 another point where we would disagree with the Court on the
22 misleading nature of the allegations in the affidavit.

23 Those are the two primary ones that come to mind.
24 There was a day when I could keep three cases straight in my
25 head, but that day is not today. It was years ago.

1 In terms of the seizures, I agree that the things
2 seized were -- I mean, I'm troubled by the generality of the
3 warrant, the description, but if the Court's going to uphold
4 the warrant in terms of its probable cause, I don't -- that's
5 not going to get me anywhere. But the last thing that I would
6 like to discuss there is nexus.

7 THE COURT: Is what?

8 MR. BOSTIC: The nexus between the alleged criminal
9 activity that Mr. Stephens claims he thought Jesse was
10 engaging in and the dwelling. I went in great detail in my
11 brief outlining the three crimes that Mr. Stephens claims he
12 thought occurred, and he told me what they were and then I
13 broke the elements down under state law for the Court. He
14 didn't satisfy any of the elements of any of the three crimes
15 he identified.

16 Be that as it may, assuming it was close enough for
17 purposes of probable cause, there's nothing in that affidavit
18 that suggests Julie or Jesse Peffer owned a printer, had a
19 printer, a computer, or that Jesse would have done any of this
20 at his home. So the second huge defect in that affidavit is
21 the lack of nexus.

22 So even if you find probable cause and even if you
23 find that he didn't lie, he didn't do anything, and I just
24 read -- in prepping for today I'm looking through the defense
25 brief, and they don't try to justify the lack of nexus. They

1 simply stop with the notion that it was Jesse Peffer's
2 residence. And I mean I put a couple of pages' worth of case
3 citations and explanations that that is not enough in this
4 circuit.

5 THE COURT: What do you do with the good faith
6 exception?

7 MR. BOSTIC: He's the investigator. He's the one
8 that obtained the warrant, and he's the one --

9 THE COURT: But that's the whole point. He obtained
10 the warrant.

11 MR. BOSTIC: He executed the warrant and he knew the
12 face of that warrant had no nexus as required by the Fourth
13 Amendment. It's not like another officer gave him information
14 or as with Mr. Edwards --

15 THE COURT: How would you expect him to know that
16 there wasn't -- that your client didn't have a printer? I
17 mean, how much does he have to know? I understand your
18 argument, but it's not a blatant misrepresentation in my
19 mind. What you're saying is he should have given more detail.

20 MR. BOSTIC: He should -- well, yes, but I'm talking
21 about nexus. He should have put anything in there to show how
22 the crimes that he thought were occurring occurred from that
23 location. They could have occurred --

24 THE COURT: We're talking by each other. I keep
25 saying you don't like the affidavit.

1 MR. BOSTIC: True.

2 THE COURT: You're saying that there was not enough
3 information in there, that there was a couple of misleading
4 things, and you've come up with two things, the zip code and
5 the -- he didn't know anything about a printer. All right. I
6 don't know about the zip code because I don't know what zip
7 codes we're talking about, but he gives it to a magistrate or
8 a district judge, whatever, and that judge signs it. That's
9 good enough for me.

10 So now you're down, it seems to me, to the zip
11 code. Was that intentionally misleading or was it a gross
12 error of some kind? No one's going to know whether he's got a
13 printer in his house. You would assume so. I mean, you know,
14 most of us do now.

15 MR. BOSTIC: But I was -- I sort of went back to
16 talking about -- complaining about the warrant, but that's
17 because you asked me how do I address good faith, and that's
18 what I was getting at was that the face of the warrant has no
19 nexus.

20 THE COURT: Okay. Conversion?

21 MR. BOSTIC: I was looking to see if I had to say
22 anything else about Mr. Stephens and I --

23 THE COURT: No, no, go ahead. You can go right
24 ahead.

25 MR. BOSTIC: You summed it up. I don't like the

1 affidavit.

2 THE COURT: Yeah. No, but now go on to -- I thought
3 you had some common law counts and a statutory count regarding
4 conversion. I'm giving you -- I've told you where I'm coming
5 from.

6 MR. BOSTIC: Yes.

7 THE COURT: And what I'm doing here is giving those
8 that disagree with me an opportunity to tell me why I'm wrong.

9 MR. BOSTIC: Yes. The reason I think you're wrong
10 on Edwards as to the seizure and the conversion is because
11 333.7532, sub (2), applies in a forfeiture context, and there
12 was no forfeiture when the demand for return of the property
13 was made, and in fact there could no longer be because the
14 statute of limitations had expired. So the problem here --
15 and I laid this out in my brief as to why I think it's
16 important that the affiant be the one responsible.

17 A member of the executive branch gets permission
18 from a member of the judicial branch to kick in a door and
19 take property and invade a private dwelling. That's very
20 significant. I mean, it's burglary if it's done by anybody
21 else.

22 And then we could have an officer in Grand Rapids
23 who needs a search warrant executed in the Upper Peninsula.
24 He sends it to a police officer up there, they take some
25 property and they package it up and mail it back to Grand

1 Rapids. Then they turn that evidence over to the FBI. The
2 citizen has no recourse except to the affiant.

3 And in the Criminal Procedure Codes, 780.656 and
4 657, I think it is, if the legislature would have wanted to
5 treat seized property as being the property of the entity that
6 employed the affiant, they could have put in the exact same
7 language that they put in the forfeiture code, but they
8 didn't.

9 THE COURT: Okay.

10 MR. BOSTIC: We've given you some basis under state
11 law where the responsibility for the return and custody goes
12 back to the officer, the seizing officer, which those cases do
13 say the seizing officer, and I have to stand here and
14 acknowledge that from everything we can determine, Mr. Edwards
15 was not the seizing officer. But again, they can do five
16 search warrants at one time and send them out to various other
17 agencies to be executed all at once. The affiant can't be
18 everywhere. So the only common denominator for accountability
19 is back to the affiant.

20 THE COURT: Would you agree he didn't seize the
21 property himself, he just did the affidavit?

22 MR. BOSTIC: I agree I can't prove he seized it. I
23 mean, you know, I have to admit that.

24 And there's a state court judge that has ruled that
25 one of the drug teams similar to this one is a governmental

1 entity. She looked at the way they do their business, the way
2 they do their finances, how their board operates, and
3 determined that they were to be treated as a municipality for
4 purposes of suing and being sued. That's not happened to all
5 the teams and there are a couple of different configurations
6 that they use for their intergovernmental agreements, but you
7 can see the problem is what is the entity. You have all of
8 the individual agencies submitting people to these teams and
9 the team itself may or may not be an entity.

10 So when it comes to accountability, I mean, the
11 courts want -- I know the courts are interested in making sure
12 that property that is seized after they've allowed this is
13 accounted for. And the best way and the only way under
14 Michigan law to do that is toward the affiant.

15 THE COURT: Have you had any case where that was,
16 you know, the factual situation? You mentioned a district
17 court, I think, case. With these exact facts?

18 MR. BOSTIC: No. The closest ones I have are the
19 ones out of the eastern side in state court. One of them
20 might have been out of the Eastern District of Michigan where
21 the liability for return of the property went back to the
22 seizing officers, and I'm almost positive those cases said
23 seizing officers. Now, they happened to be the affiant, you
24 know, but the case said seizing officer, and those are --

25 THE COURT: How do they even -- they don't even have

1 custody of it after they bring it in.

2 MR. BOSTIC: Right. It's logged in, it's put in the
3 evidence room, and sometimes the officers themselves, the
4 staff officers can't even get into the evidence room without
5 the sergeant or the lieutenant of the team. I agree, Your
6 Honor. But my point is in terms of accountability, once the
7 police seize this property, the only direct recourse the Court
8 has is back to the one person that the Court gave authority to
9 to go take it in the first place.

10 THE COURT: Well, your client as I understand it did
11 ask for the property back eventually and got it.

12 MR. BOSTIC: The Edwards, yes. Yes. The Coon cell
13 phone and money, no.

14 THE COURT: Well, yeah. That was done pursuant to
15 the settlement basically, wasn't it?

16 MR. BOSTIC: No. That was Julie's money. That was
17 the \$1,700. The money and the phone taken from Jesse by Mr.
18 Coon is the other conversion count. To this day we don't have
19 that property back.

20 THE COURT: Okay. Okay.

21 MR. BOSTIC: I think that sums up -- I mean, I
22 had -- you laid out your thoughts and I've addressed them
23 directly, and my brief I think goes into a lot more detail and
24 probably says some things I forgot, but I think I've made my
25 record.

1 THE COURT: Thank you. Okay. Let me just check
2 things here a minute.

3 All right. We heard from Ms. Dersham.

4 MS. DENSHAM: Densham.

5 THE COURT: Densham?

6 MS. DENSHAM: Densham, yes.

7 THE COURT: Tell me, because I've got D-r-s-h-a-m,
8 it looks like.

9 MS. DENSHAM: It's D-e-n-s-h-a-m.

10 THE COURT: Densham?

11 MS. DENSHAM: Densham.

12 THE COURT: Gotcha, okay.

13 Ms. Vogler, why don't you go for Mr. Edwards.

14 MS. VOGLER: Thank you, Your Honor.

15 If I can clarify and understand what the Court's
16 initial comments were, it said as a matter of law Nate Edwards
17 did not commit common law conversion.

18 THE COURT: That's what I said.

19 MS. VOGLER: Yes, and that the statutes are clear
20 that an author of a search warrant and a search warrant
21 affidavit by those acts alone does not commit conversion.

22 THE COURT: That's what I said, but then Mr. Bostic
23 stood up.

24 MS. VOGLER: Yes, sir. And the statute that Mr.
25 Bostic and the plaintiffs are relying on is 780.655 which is a

1 criminal procedural statute, and the distinction in the case
2 law that was raised by Mr. Bostic is simply that, and I've
3 read those cases, is that those cases do not involve a search
4 warrant being issued and then executed upon. Those were
5 seizing officers who were at a scene or at a site and seized
6 and then were held responsible for transporting that property
7 that they seized pursuant to probable cause without a warrant
8 being issued, and then later that property was retained by
9 them and logged in by that officer. That's the definition in
10 the case law of the officer.

11 Clearly in this case Mr. Edwards -- Detective
12 Edwards did not execute, and the word "execute" is used in
13 780.655, he did not execute the search warrant that he
14 authored. So that's the factual distinction here.

15 So there's two bases to dismiss plaintiffs' Count 8
16 against Nate Edwards. The facts are not consistent under any
17 construction in Michigan law of common law conversion; and
18 secondly, the property was seized pursuant to a lawfully
19 statutorily authorized search warrant. There's no allegation
20 that there was no probable cause for the search warrant.
21 There's no allegation against Detective Edwards that anything
22 was untruthful or misleading in the affidavit or the search
23 warrant itself. So our argument is simple. As a matter of
24 fact and as a matter of law, there is no basis for a claim of
25 common law conversion.

1 And even if there were, Detective Edwards is
2 entitled to qualified immunity. There is no material issue of
3 fact raised by the plaintiff in response to our motion that
4 can establish or refute any of the elements under Odom.
5 They're clear. No malice. They never met Detective Edwards.
6 I asked them at their deposition, Any reason to believe he had
7 ill will or malice towards you? No. No. Admissions of the
8 plaintiffs.

9 So, Your Honor, that's our position in response to
10 the plaintiffs' comments today. I understand the Court didn't
11 feel the need in your initial comments to go to the issue of
12 qualified immunity, but perhaps in light of what Mr. Bostic
13 stated, even if you were to assume --

14 THE COURT: Well, that's something if it goes on
15 appeal you can take up with the appellate court if I rule in
16 your favor.

17 MS. VOGLER: Right, yeah. But our argument is even
18 if you assume that there is a factual and/or legal basis for
19 common law conversion, he's still entitled to qualified
20 immunity and that would dismiss the count in and of itself.

21 THE COURT: All right. Thank you.

22 MS. VOGLER: Thank you.

23 THE COURT: Okay. Next we have Mr. Froehlich.

24 MR. FROEHLICH: Yes, Your Honor, thank you. Joe
25 Froehlich for Detective Stephens.

1 THE COURT: Okay.

2 MR. FROEHLICH: On Mr. Bostic's second point
3 regarding the facial validity of this warrant, what he has to
4 show to overcome the warrant is that no reasonable officer
5 would have ever relied on it, and I think that's a tough row
6 to hoe. The affidavit laid out this is why I think Mr. Pepper
7 was engaged in this activity. This is where he lives. This
8 is how I think they're being produced. I think it's being
9 produced at his house. I don't see how it's so lacking that
10 no one would have ever relied on it.

11 Then the other point about misrepresentations or
12 omissions, one thing that Mr. Bostic didn't talk about is it's
13 not just a misrepresentation or omission. It has to be a
14 misrepresentation or an omission made with the intent to
15 mislead, and there's just no evidence of that.

16 And even if there was a misrepresentation about this
17 post office issue, take it out. Take out the statement of Mr.
18 Stephens that this was postmarked Grand Rapids and Grand
19 Rapids is the central sorting facility. Probable cause still
20 exists without that statement. And if it's -- I don't see how
21 it's an omission when it's an affirmative statement.

22 And then about the differences between the flyers,
23 while there may have been a difference in the form of these
24 flyers and mailings, the substance was certainly the same,
25 being, Hey, I'm a police officer, I want you to know that Tom

1 Beemer is a snitch, with the purpose of intimidating Mr.
2 Beemer, which is unlawful. If these were done for anything,
3 it was to intimidate Mr. Beemer to prevent him from continuing
4 to -- as a confidential informant. So I don't know if you
5 have any other questions for me.

6 THE COURT: No, I don't. Thank you.

7 MR. FROEHLICH: Thank you, Your Honor.

8 THE COURT: Well, anybody with any rebuttal? Mr.
9 Bostic?

10 MS. DENSHAM: No, Your Honor.

11 THE COURT: Okay. Mr. Bostic, any rebuttal to
12 this?

13 MR. BOSTIC: Very little, Your Honor, but yes.

14 Regarding Mr. Stephens, he was on the case for about
15 24 hours. Throughout the brief he claims he did a competent
16 and thorough investigation. It was 24 hours' worth at best.
17 He got a call from the lieutenant at CMET who spewed his
18 beliefs as to who was responsible and he reacted the next day
19 with a search warrant.

20 He claims that he reviewed the case file that had
21 reports from Trooper Glentz that talked about no fingerprints
22 and listed other suspects. He had the report from Detective
23 West of Big Rapids Police Department which listed all four
24 people that Mr. Beemer had informed on, and he completely
25 disregarded all that. He went back to the prosecutor's office

1 that had disqualified itself to get his warrant. So in
2 balance, Your Honor, I think there are things there that
3 create a jury question.

4 THE COURT: All right.

5 Well, regarding Count 1, I'm going to pretty well
6 stick with what I said before, and I've already read what that
7 count is about. In Scott v. Harris, 550 U.S. 372, 127 S. Ct.
8 1769, 2007, there was a videotape depicting the events that
9 clearly contradicted plaintiff's version of events. There's
10 no such evidence here.

11 There is a dispute over the evidence as to Mr. Coon
12 being concerned about whether Julie Peffer was armed. The
13 police officer must point to specific facts from which a
14 reasonable inference of her being armed could be drawn. The
15 purpose of the search would be to allow the officer to go
16 about his business without harm to anyone, not to find
17 evidence of a crime. That's Adams against Williams, 407 U.S.
18 143, 146; 92 S. Ct. 1921 at 1923, 1972.

19 In my judgment Mr. Coon's reliance upon the fact
20 that Jesse had just been arrested does not justify the search
21 of Julie's purse. Cases where the officer made a search
22 during criminal activity do not support his position as well.
23 There was no report from third parties and no reasonable
24 suspicion regarding any criminal activity on behalf of Julie
25 Peffer.

1 Count 2 which I've already described, the problem
2 with Mr. Coon's argument is that Michigan law does not give
3 collateral estoppel effect to consent judgments. American
4 Mutual Liability Insurance Company against Michigan Mutual
5 Liability Company, 235 N.W.2d 769, 64 Mich App 315, 1975. A
6 consent judgment reflects the agreement of the parties, and
7 the judge's approval is simply ministerial.

8 The plain view doctrine does not help Mr. Coon
9 because the object's incriminating character must be
10 immediately apparent. For example, in United States v.
11 \$99,999 In United States Currency, 69 F. App'x 757, 765, Sixth
12 Circuit, 2003, the Court said fifteen to twenty thousand
13 dollars standing alone is hardly enough cash to justify the
14 search. The Court held that \$4,000 found in a motel room
15 raised not more than a suspicion and did not raise probable
16 cause or a preponderance of the evidence that this cash was
17 connected to illegal drug activity.

18 I understand that the cash we're talking about was
19 not totally the only factor being looked at because her
20 husband had already been stopped. Her husband wanted to get
21 in touch with her. She had it and I understand it was packed
22 a little bit differently, but not to the extent that it was
23 covered up with -- I think she had a paper clip on it. It was
24 not covered up with any tape or things like that that would
25 try to keep the smell of drugs away from the drug dogs that

1 they have.

2 I've already referred to the Rooker-Feldman
3 doctrine. It doesn't help him. That doctrine applies only
4 when the plaintiff complains of injury from the state court
5 judgment. Here Julie is not complaining about injury from the
6 state court judgment. She is complaining about injury arising
7 from the seizure of the cash. Exxon Mobil Corporation against
8 Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517,
9 2005.

10 Regarding Count 3, this claim I've already said is
11 barred by the doctrine of qualified immunity, and I referred
12 you to the two cases, United States v. Gholston, 993 F. Supp.
13 2d 704, 711, Eastern District of Michigan, 2014, and it goes
14 to the fact that you cannot without a warrant get to the
15 numbers being called or received on the cell phone. But that
16 case came out after the events of this matter. That came out
17 in Riley against California, 134 S. Ct. 2473 at 2488-92, 2014,
18 which I said police may not search the cell phone of an
19 arrestee even, and she wasn't under arrest, without a warrant.

20 Regarding Counts 4 and 5, I've referred to those.
21 Those go to the affidavit. These are the claims against Mike
22 Stephens.

23 Probable cause is defined as a reasonable grounds
24 for belief supported by less than prima facie proof, but more
25 than mere suspicion. The grounds for gaining a search warrant

1 need not be perfect or provide every specific piece of
2 information to be upheld. In a civil rights case an officer
3 is entitled to rely on a judicially secured arrest warrant as
4 satisfactory evidence of probable cause unless an officer
5 knowingly makes false statements or admissions that materially
6 affect the probable cause determination. Then the officer may
7 be held liable if the affidavit contains false statements or
8 those made in reckless disregard of the truth. The officer is
9 not required to independently investigate every claim of
10 innocence. And just bear with me a minute.

11 Well, yeah. Plaintiffs' primary assertion is that
12 the affidavit does not establish probable cause or that
13 Stephens failed to fully consider other possibilities.
14 However, none of these arguments provide a basis for
15 concluding that the affidavit did not establish probable
16 cause. Once probable cause is established, an officer has no
17 duty to investigate more or look for evidence that is
18 exculpatory. That's Kentucky against Young, 51 F. App'x 543,
19 546, Sixth Circuit, 2002.

20 A problem with plaintiffs' argument is that they
21 merely disagree, as I said earlier, with Stephens' conclusions
22 and fail to undermine the affidavit showing probable cause.
23 The alleged conduct of sending false letters could reasonably
24 be attributed as they were attributed. And once again I
25 failed to identify specific false statements with a possible

1 exception now of the post office, but that is a very minor
2 thing in my judgment. They go to the reasonableness of the
3 conclusions that could be drawn from the affidavit, and those
4 reasonable conclusions are not drawn by the officer himself.
5 Those reasonable conclusions are drawn by the judicial officer
6 issuing the warrant.

7 And as I've said, then you run into the good faith
8 exception. That is, even if the warrant is bad, if the
9 officer relied upon it in good faith and he had all the
10 relevant facts in there, then he cannot be held responsible.

11 Count 5, same rationale as I had on Count 4.

12 The conversion claim against Coon is dismissed
13 because it's undisputed that he left the Sheriff's Central
14 Enforcement Team in 2013. There's no allegation that he
15 personally possessed the money or the cell phone at the time
16 of the alleged conversion.

17 In addition, he's entitled to governmental immunity
18 on the conversion claim. Number one, the acts were undertaken
19 during the course of his employment. He performed the --
20 number two, he performed the acts in good faith and without
21 malice. And three, the acts were discretionary as
22 distinguished from ministerial.

23 Regarding Count 8, Jesse alleges that the search
24 warrant in 2012, that many items were not returned. This is
25 the count against Nathan Edwards. It's undisputed that

1 Edwards did not execute the search warrants. Even if he had,
2 the property by state law is in the custody of the seizing
3 agency. M.C.L. Section 333.7532(2).

4 He delivered them to the premises to be searched.
5 Furthermore, after keeping the property for a brief while --
6 he got them from the premises to be searched. Furthermore,
7 after keeping the property for a brief while in the Michigan
8 State Police temporary storage, the property was delivered to
9 and maintained in a secure storage area to which Edwards did
10 not have direct access.

11 Also, plaintiffs never asked anyone to return their
12 property or moved in state court for return of the property.
13 As I understand it, at least, the property has now been
14 returned to plaintiffs, but that's not dispositive in this
15 particular thing.

16 M.C.L.A. Section 780.655 does not help plaintiffs.
17 It governs an officer in execution of a search warrant
18 regarding property or anything covered by a search warrant.
19 It is the seizing agency, as I said earlier, that is
20 responsible, not the officer.

21 And with your permission, Mr. Bostic, I'm going to
22 strike Count 9, the exemplary damages, just to keep the record
23 clear, understanding that you have a right to request that if
24 it goes to trial.

25 MR. BOSTIC: It is derivative of what's left now,

1 would be Counts 1 and 2.

2 THE COURT: Right.

3 MR. BOSTIC: And it's merely derivative. I did stop
4 doing that as separate counts for awhile.

5 THE COURT: Yeah.

6 MR. BOSTIC: Some of the judges preferred it.

7 THE COURT: Really?

8 MR. BOSTIC: Because of the heightened element of
9 proof for the exemplary. But it's --

10 THE COURT: Okay. It's there. No matter -- I'm not
11 going to strike it. We'll leave it there, and I'm just going
12 to slide it in my own mind from Count 9 to request for
13 relief. How is that?

14 MR. BOSTIC: That's understood, Your Honor.

15 THE COURT: All right. Anything from the parties
16 here?

17 MS. DENSHAM: No, Your Honor.

18 MR. FROEHLICH: No, thank you, Your Honor.

19 MS. VOGLER: No, thank you. I had some concern
20 about August 17th, but to the extent that Count 8 has been
21 dismissed, that eliminates the need for me to worry about our
22 final pretrial.

23 THE COURT: Yes.

24 MR. BOSTIC: Nothing from the plaintiffs, Your
25 Honor.

1 THE COURT: All right. Thank you. Okay. We're
2 adjourned. Thank you.

3 MR. BOSTIC: Thank you, Your Honor.

4 MS. VOGLER: Thank you.

5 (Proceedings concluded at 2:55 p.m.)

6 * * *

7 CERTIFICATE OF REPORTER

8
9 I, Kevin W. Gaugier, Official Court Reporter for the
10 United States District Court for the Western District of
11 Michigan, appointed pursuant to the provisions of Title 28,
12 United States Code, Section 753, do hereby certify that the
13 foregoing is a true and correct transcript of the proceedings
14 had in the within-entitled and numbered cause on the date
15 hereinbefore set forth.

16 I do further certify that the foregoing transcript
17 was prepared by me.

18
19
20
21 /s/ Kevin W. Gaugier

22 Kevin W. Gaugier, CSR-3065
23 U.S. District Court Reporter
24 110 Michigan N.W.
25 622 Federal Building
Grand Rapids, MI 49503